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No. 04-

IN THE

Supreme Court of the United States

BONNIE J. KORESKO and
JOHN J. KORESKO, V.,

Petitioners,

v.

MARK FARLEY, SEATON ROSS, L.P., TOWNSHIP OF TREDYFFRIN, BRYN MAWR CUSTOM HOME, INC., and OLLIE BOWER,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT, BOARD OF SUPERVISORS OF TREDYFFRIN TOWNSHIP IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

Does a municipality engage in state action and deprive a landowner of a protected property interest simply by approving a subdivision plan on behalf of a neighboring property in which the landowner has no recorded interest?

Assuming, *arguendo*, that a landowner has a protected property interest in land which is the subject of subdivision approval, may a landowner who fails to avail himself of the process available for challenging the approval of the subdivision plan in state court properly claim a deprivation of his procedural due process rights?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment provides, in relevant part, as follows:

> No State shall...deprive any person of life, liberty or property, without due process of law...

U.S. Const. Amend. XVI, § 1

Section 1983 of the Civil Rights Act provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. § 1983.

STATEMENT OF THE CASE

In February, 2000, the Petitioners' next door neighbor, Ollie Bower, filed an application for approval of a subdivision plan for his property ("Bower Tract,")with the Board of Supervisors of Tredyffrin Township, Pennsylvania.[1] The Board of Supervisors approved the application during the course of a public meeting on February 20, 2000. No appeal was taken and the approved plan promptly was recorded in the Office of the Recorder of Deeds in Chester County, Pennsylvania.

Thereafter, Bower sold the property to a development company, Seaton Ross, LP, to construct houses on the newly-subdivided property. (App. 174a). During construction, the roots of trees adjacent to the boundary on Petitioners' property were damaged. (App. 179a).

Petitioners, John and Bonnie Koresko, own the property adjacent to the Bower Tract. (App. 175a). At no time during the proceedings before the Board of Supervisors did Petitioners appear or oppose the subdivision. In addition, Petitioners never challenged the approval of the subdivision plan by appealing the Board of Supervisors' decision to the Court of Common Pleas of Chester County or to any other court in Pennsylvania.

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[1] At the time the application was submitted, the Bower Tract was owned by Respondent Bower. Houses on the land were later constructed by Respondent Farley and purchased by Respondents Grupps and Kayes.

Nevertheless, several months after the subdivision approval was granted and after construction on the property commenced, Petitioners brought suit in the Court of Common Pleas of Chester County, Pennsylvania against the Township, the property owners and the developer in an attempt to set aside the subdivision approval and to obtain equitable relief. In their complaint, Petitioners contended that "ancient" trees on Petitioners' property contained root systems that extended "naturally and unabated" to the subject property for a period in excess of 21 years which in turn gave rise to an "easement," by adverse possession, on that portion of the "Bower Tract" where the roots were located. (Pet. 5). According to Petitioners, the Township's failure to consider this "easement" when it approved the subdivision plan rendered the approval invalid and required it to be set aside. Petitioners concede that they never recorded the easement.

Later, by separate pleading, Petitioners filed a motion to disqualify the Township's counsel, on the grounds that counsel's previous representation of John Koresko in an unrelated collection matter gave rise to a conflict of interest.

The Township filed a motion for judgment on the pleadings in which it argued that Petitioners failed to establish the existence of a constitutionally-recognized property interest in the tree roots – or more specifically, the subterranean soils permeated by the tree roots -- sufficient to state a claim for a violation of Petitioners' due process rights. The Township also opposed the Motion to Disqualify on the grounds that no actual conflict of interest existed. The trial court agreed with the Township on both counts, denied the motion to disqual-

ify counsel and granted the Township's motion for judgment on the pleadings. (App. 112a).

In its decision dismissing Petitioners' claims against the Township, the court found that there was no recognized property interest in tree roots which could be said to form the basis of a colorable procedural due process claim. In addition, the court found that even if such a protected property interest had been identified, there was no sufficient allegation that the Township's procedure for subdivision approval was in any way flawed or constitutionally defective. (R. 112a-113a). To the contrary, the court noted, the Township's ordinance followed the requirements of Pennsylvania's Municipalities Planning Code and hence, any challenge to the ordinance should be deemed a challenge to the Pennsylvania Municipalities Planning Code. The court dismissed this claim because no argument had been made to substantiate it. (App. 113a). The court denied as moot the Koreskos' motion to disqualify the township's counsel but noted that even if the court "had reached the merits of the motion, [it] would have been denied as being without merit" (App. 113a-114a).

After claims against the additional defendants were dismissed or withdrawn, Petitioners appealed. The Commonwealth Court of Pennsylvania agreed with the trial court that there is no easement for tree roots cognizable under Pennsylvania law and, accordingly, affirmed the Orders of the lower court. (App. 23a). Petitioners then filed petitions for allowance of appeal with the Pennsylvania Supreme Court but the Pennsylvania Supreme Court declined to hear the case. (App. 1a).

REASONS FOR DENYING THE PETITION

The petition should be denied for four reasons. First, the Pennsylvania courts are correct that Petitioners do not raise a constitutionally-recognized property interest protected under the Fourteenth Amendment and the Pennsylvania courts' decision in this regard do not conflict with decisions of this Court or the highest court of any other court of any state. Second, even if Petitioners could establish a constitutionally-protected property interest, Plaintiffs fail to establish how any action on the part of the Township interfered with those rights. Third, Petitioners failed to establish how they availed themselves of procedural safeguards in place in Pennsylvania and/or how those safeguards were constitutionally defective. Finally, Petitioners fail to explain how the Pennsylvania courts abused their discretion in denying Petitioners' motion to disqualify counsel for the Township. This case, then, does not present an issue worthy of review by this Court.

A. Certiorari is Unwarranted Because Petitioners Have Not Asserted and Do Not Possess A Constitutionally-Recognized Property Interest Under the Fourteenth Amendment That Gives Rise to A Procedural Due Process Claim.

In the Pennsylvania state courts, Petitioners asserted that Petitioners' procedural due process rights were violated by the Township when it approved the subdivision application submitted for the Bower Tract.

The Pennsylvania courts correctly held that this claim failed for two reasons – (i) because Petitioners failed to ar-

ticulate a constitutionally-protected property interest and (ii) because Plaintiffs failed to show that the procedures in place were defective.

It is well-settled that a Plaintiff seeking to assert a due process claim must identify: (i) a constitutionally protected property right to which the Fourteenth Amendment's due process protection applies as well as (ii) arbitrary and capricious government action which is not rationally related to a legitimate government interest and/or is motivated by bias, bad faith or improper motive. *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 599-600 (3d Cir.), *cert. denied*, 516 U.S. 937 (1995); see also, *Anselma Station, Ltd. v. Pennoni Associates, Inc.*, 654 A.2d 608 (Pa. Cmwlth. 1995)(the existence of a property right is an essential element of a § 1983 claim.). The question of whether the property interest requirement has been met is generally a matter of law for the court to decide. *Id.*

In determining whether a property right exists, courts have recognized that property interests are not created by the Constitution, rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Acierno v. Cloutier*, 40 F.3d 597, 616 (3d Cir. 1994). Thus, when analyzing due process claims, courts must turn to state and local law to determine whether the plaintiff possessed a property interest which was abrogated by the governmental action. *Id.*

Accordingly, unless Petitioners in this case could establish that they possessed an easement, recognized under state law,

on the Property which protected the tree roots encroaching from their property, Petitioners could not establish that they were deprived of a property interest that would support a §1983 claim, even if those roots were damaged by development of the Bower Tract.

In this case, however, try as they might, Petitioners simply did not establish that they perfected an easement of any sort in the Bower Tract. In particular, they did not show that an enforeceable agreeement spontaneously arose under Pennsylvania law as a result of the subterranean permeation by tree roots across property lines. Indeed, the fundamental predicates of adverse possession -- which are open and notorious possession of land to the exclusion of the rightful owner -- obviously are completely absent from this case. Here, the instrusion by Petitioners' tree roots were neither "open" nor "notorious" and did not exclude the rightful owner from possession. Thus, Petitioners cannot establish a property interest - - let alone a constitutionally – protected property interest and, hence have failed to establish an essential element of their due process claim. Despite being directly challenged to do so Petitioners are unable to cite to a single case in which a Pennsylvania court has recognized such an easement and/or has applied the Fourteenth Amendment to such a claim.

The best Petitioners can do is cite to *Jones v. Wagner*, 425 Pa. Super. 102, 624 A.2d 166 (1993), a Pennsylvania Superior Court case that they contend stands for the proposition that such a right *could* exist. Specifically, Petitioners rely on a passing statement made in a footnote where the court "wonder[ed] whether the continued presence of encroaching tree branches, held openly, notoriously, hostilely, and con-

tinually for 21 years would create a prescriptive easement in the airspace in which they hang." *Id.* at 170-71 n.3. Petitioners' reliance on the language in this footnote to support their claim of an easement for *tree roots* is flawed for several reasons.

First, the *Jones* case involved tree branches, not tree roots. While Petitioners make reference in their Petitions to acquired easements in the branches of the subject boundary trees, it is clear from a review of the Amended Complaint that Petitioners only claimed an easement in the *root systems* of the trees. *See e.g.*, ¶ 67 "As a matter of law, the owners of the Koresko property have acquired an easement against the 1185 Property with respect to the root systems of the trees and other foliage along the boundary line"). Accordingly, even if the *Jones* Court meant to suggest that there could be a prescriptive easement in encroaching *tree branches*, that suggestion, in dictum, does not stand for the proposition that an easement could be found based on the location of *tree roots*.

Furthermore, even if Pennsylvania law specifically recognized that a easement could arise from the underground encroachment of in tree roots, which it does not, Petitioners cannot establish an easement by prescription, since, as they acknowledge, "It is ancient and unquestioned law that to acquire an easement by prescription, the exercise of possession must be adverse, open, notorious and uninterrupted for a period of at least twenty-one years." *Lewkowicz v. Blumish*, 442 Pa. 369, 371, 275 A.2d 69, 70 (1971) (citing *Fec v. Mickail*, 438 Pa. 439, 265 A.2d 800 (1970)). The proof of such exercise of possession must be by clear and positive evidence. *Id.*

Very simply, Petitioners cannot establish an easement by prescription because they cannot establish that the allegedly intruding tree roots were in open and notorious possession for twenty-one years. That the intrusion was underground makes it impossible to establish "open," "notorious" and "hostile". Moreover, there is no way to establish how long any intrusion occurred: even if one portion of a root is in existence for twenty-one years, it does not follow that the root in its entirety has been in existence for that same length of time. As aptly noted by the lower court, "it is simply ludicrous to argue that if a root or a branch encroaches on another's property to any extent whatsoever then the owner of the tree has an unlimited easement over the property of that other to the full extent that those branches or roots might grow over time." See trial court opinion dated December 4, 2002, p. 2-3 fn.1.

Moreover, the actual holding of *Jones* is directly contrary to Petitioners' position. Petitioners seek damages for injuries to their boundary trees as a result of Farley's construction of a driveway and other improvements along the boundary with the Bower Tract. Petitioners alleged that these improvements damaged the root systems of the boundary trees. In *Jones*, however, the Pennsylvania Supreme Court found that Pennsylvania law affords a "full panoply" of remedies to a landowner whose property is encroached by overhanging branches or tree limbs and that where landowners are "only exercising their right to trim branches and limbs of encroaching trees, they may not be held liable in damages for doing so." *Id.* at 168. Hence, if one were to extend the *Jones* holding to include tree root systems, it follows that the owner of the Bower Tract had the right under state law to trim, cut

back or otherwise interfere with any tree roots that encroached onto that Tract from Petitioners' property.

In sum, the Pennsylvania courts correctly concluded that Petitioners failed to identify a constitutionally-recognized property interest in this case. Petitioners have cited to no case law – and Respondents have found none – where an interest in tree roots has been found to merit constitutional protection. Accordingly, Petitioners' due process claims property were dismissed by the Pennsylvania courts.

B. Petitioners Cannot Establish that the Township, By State Action, Deprived them of Any this Interest.

Even assuming Petitioners could identify a protected property interest -- which they have not and cannot do – Petitioners cannot identify any action undertaken by the Township that caused a deprivation of that interest. For this reason as well, the Pennsylvania courts properly concluded that Petitioners' due process claims were without merit.

In reality, this case is simply a dispute between two adjacent property owners. Notwithstanding Petitioners' efforts to articulate a novel constitutional theory against that Township, they fail to cite any action by the Township that actually interfered with the trees, their roots, or for that matter, any easement Petitioners' allegedly possessed. To the contrary, the *most* that Petitioners allege about the Township is that it approved a subdivision application submitted to it without taking into consideration unrecorded and unperfected easements that Petitioners allegedly possessed. Conspicuously absent from Petitioners' arguments, however, is any allegation as to *how the Township was to know about the*

purported easement and/or how that interest was perfected. In this case, the alleged possessory interest never was recorded by Petitioners, and hence, even if relevant, did not exist as far as the Township was concerned. If Petitioners truly believed that they had obtained a possessory interest in the tree roots on the subject property, they had a duty and obligation to perfect that interest by recording it in the County Recorder of Deeds. Having failed to perfect this interest, Petitioners simply have no basis upon which to complain.

Moreover and perhaps more importantly, Petitioners' arguments ignore the fact that the Township's approval of the subdivision was not causally related to the actions on the Bower Tract that affected the trees. Nothing about the subdivision approval required the owners to remove tree roots. On the other hand, the Bowers Tract owners clearly could have dug up or severed the tree roots independent of subdivision approval from the Township.

In sum, it is clear that there is no basis upon which the Township's actions in approving a subdivision plan may be found inextricably intertwined with the landowner's removal of tree roots from the Bower Tract. Hence, Petitioners' constitutional claims also were properly dismissed for failure to identify the requisite state action.

C. Petitioner's Failure to Avail Themselves of Procedures in Place for Challenging the Approval of the Subdivision Plan Also Is Fatal to Their Procedural Due Process Claim.

Even assuming Petitioners could identify a protected property interest, they have not and indeed, could not, allege that the Pennsylvania procedures available to them under Pennsylvania state law for challenging the proposed subdivision of the Bowers Tract were defective. Thus, the lower courts' decision to dismiss Plaintiffs' procedural due process claims is correct for this reason as well.

Petitioners claim that they were entitled to relief because the Township *failed to revoke* the subdivision Plan, which Plaintiffs claim was defective.[2] However, Petitioners did not file a timely appeal from the Township's approval of that subdivision plan under the Municipalities Planning Code

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[2] Specifically, Petitioners alleged that the Subdivision was defective because it did not list the Petitioners' easement rights. However, even if Petitioners did have valid easement rights to the Property that were not listed on the Subdivision Plan, which they did not, the Township's failure to revoke said Plan does not give rise to a cause of action against the Township. The law in this Commonwealth is that a township is not permitted to consider an adjoining landowner's private easements in approving a subdivision plan. *Gulla v. North Strabane*, 676 A.2d 709 (Pa. Cmwlth. 1996) (citing *Michener Appeal*, 382 Pa. 401, 115 A.2d 367 (1955)). *See also Gossman v. Lower Chanceford Township Board of Supervisors*, 503 Pa. 392, 468 A.2d 996 (1983). Clearly, the Township did not have the discretion to consider the Koreskos' alleged easement rights when reviewing the Subdivision Plan.

("MPC"), 53 Pa.C.S. § 10101 et. seq., and, to the extent they knew about the approval, waived any claim that it was deficient.

Pursuant to the Township's Code "[a]ppeals from the actions of the Board of Supervisors or the Planning Commission with respect to any application for subdivision or land development approval shall be governed by the applicable provisions of Act 247, the Pennsylvania Municipalities [Code]." The relevant provision of the MPC provides as follows:

> All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the Court of Common Pleas of the judicial district wherein the land is located *and shall be filed within thirty (30) days after entry of the decision* as provided in 42 Pa.C.S. § 5572 (relating to time of entry of order) or, in the case of a deemed decision is given as set forth in Section 908(9) of [the MPC].

53 P.S. § 11002-A (emphasis supplied).

The procedures set forth in Article X-A constitute the exclusive method for securing the review of any decision rendered pursuant to Article IX of the MPC. 53 P.S. § 11001-A. The requirement that appeals be taken under the MPC is mandatory. *Appeal of Cibula*, 25 Pa. Cmwlth. 333, 360 A.2d 812 (1976).

In this case, the subdivision plan was approved by the Township Board of Supervisors on February 28, 2000 (R.R. 724a at ¶ 15). Accordingly, Appellants had until March 30,

2000 to file an appeal pursuant to the MPC.[3] Because Appellants failed to appeal the granting of the subdivision approval in accordance with the mandatory provisions of the MPC, the Pennsylvania courts lacked jurisdiction over their claims regarding the alleged defectiveness of the Subdivision.

Moreover, to the extent that Petitioners' argument rests on a claim that Petitioners were deprived of due process because they did not have notice of – and therefore could not challenge – the subdivision approval within the thirty-day period and thus they have been deprived of their constitutional rights to due process for this reason as well, this claim, too, is without merit. First, in making this argument, Petitioners fail to acknowledge that the subject subdivision was of *their next door neighbor's* property, and the various decisions made by the Board were made in public meetings. Had Petitioners kept themselves informed, they would have been aware of their neighbor plans and the decision-making by the Board, in a timely manner. Petitioners also fail to recognize that even if they had not been aware of or received notice of the approval of the subdivision plan, they were not precluded from challenging that Township action once they became aware of it. In fact, a specific provision in the Municipalities Planning Code allows a party who believes he or she is aggrieved but learns of a decision in a land use case beyond the thirty day appeal period to file an appeal "nunc pro tunc" asserting the lack of notice as the grounds for the delay. Spe-

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[3] The Subdivision Plan was recorded with the Chester County Recorder of Deeds on March 23, 2000. Accordingly, the *very* latest Appellants arguably could have appealed was April 22, 2003.

cifically, the Municipalities Planning Code states, in pertinent part:

> [N]o person shall be allowed to file any proceeding with the board later than 30 days after [approval] if such proceeding is designed to secure reversal or limit the approval in any manner unless such person alleges and proves that he had no notice, knowledge, or reason to believe that such approval had been given." (Emphasis added.)

53 Pa.C.S. § 101914.1(a).

Therefore, had Petitioners truly believed they were aggrieved by the Township's decision to approve the subdivision of the Bower Tract, they could have filed an appeal nunc pro tunc, once they became aware of the subdivision approval. Petitioners' failure to invoke this remedy, too, is fatal to their claims.

In sum, the Pennsylvania courts properly recognized that Petitioners had not made out a claim under the Fourteenth Amendment. There is no conflict between this case and any other decided by this Court, and thus, this Court should deny Petitioners' petition in its entirety.

D. Petitioners Have Failed To Articulate A Cognizable Reason Why This Court Should Review The Pennsylvania Court's Decision Affirming The Denial Of The Motion to Disqualify the Township's Counsel.

Petitioners alternatively contend that this Court should grant certiorari to correct the Pennsylvania courts' Orders denying their request to disqualify the Township's counsel

based on an alleged conflict-of-interest. Specifically, Petitioners allege that counsel's previous representation of John Koresko in an unrelated collection matter should have precluded counsel from representing the Township in this case. Petitioners do not explain how this issue – clearly a matter of state law, within the discretion of the trial court and thus measured against an abuse of discretion standard by the state appellate courts – rises to the level of a claim worthy of this Court's review.

Moreover, in their attempt to raise this as an issue, Petitioners fail to provide a fair or complete statement as to the context for the lower court's ruling. The facts of this case demonstrate that the trial court denied the motion, and the Commonwealth Court affirmed the denial of this motion because once the Township was dismissed as a defendant in the action, the issue became moot. And, while Plaintiffs purport to claim that the court committed "reversible error" by failing to address the disqualification motion before rendering a ruling on the motion for judgment on the pleadings, Petitioners are unable to offer any case law to support this contention.

In order to establish an abuse of discretion and/or reversible error, Petitioners, of course, would have to show that there would have been a different outcome if the trial court had ruled on the motion to disqualify *prior to* the motion for judgment on the pleadings. This, too, is a burden Petitioners cannot meet. In denying the motion to disqualify as moot, the trial court nonetheless noted that, in any event, the motion would have been denied as without merit. Thus, even if the trial court had decided the motions in reverse order, the outcome would have been the same.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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